



COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Part 1507

[CEQ–2021–0001]

RIN: 0331–AA08

Deadline for Agencies to Propose Updates to National Environmental Policy Act Procedures

AGENCY: Council on Environmental Quality.

ACTION: Interim final rule; request for comments.

SUMMARY: The Council on Environmental Quality (CEQ) is extending the deadline by two years for Federal agencies to develop or revise proposed procedures for implementing the procedural provisions of the National Environmental Policy Act (NEPA).

DATES: *Effective date:* This interim rule is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments due date: CEQ must receive comments on this interim rule by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments through any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: 202–456–6546.
- Mail: Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: All submissions must include the agency name, “Council on Environmental Quality,” and docket number, CEQ–2021–0001, for this rulemaking. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information

provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

- *Docket*: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Amy B. Coyle, Deputy General Counsel, 202-395-5750, Amy.B.Coyle@ceq.eop.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, (NEPA) directs Federal agencies to “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 42 U.S.C. 4331(a). In pursuit of that directive, NEPA requires Federal agencies to prepare an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. 4332(2)(C). NEPA also established the Council on Environmental Quality (CEQ) in the Executive Office of the President, 42 U.S.C. 4342, which oversees Federal agency implementation of NEPA.

In 1970, President Nixon issued E.O. 11514, *Protection and Enhancement of Environmental Quality*, which directed CEQ to issue guidelines for implementation of NEPA.¹ In 1977, President Carter issued E.O. 11991, *Relating to Protection and Enhancement of Environmental Quality*, directing CEQ to issue regulations to govern implementation of NEPA and requiring that Federal agencies comply with those regulations.² CEQ promulgated implementing regulations in 1978 at 40 CFR parts 1500 through 1508 (“1978 Rule”).³ Consistent

¹ 35 FR 4247 (Mar. 7, 1970), sec. 3(h).

² 42 FR 26967 (May 25, 1977), sec. 2(g).

³ Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 43 FR 55978 (Nov. 23, 1978).

with the requirement in 40 CFR 1507.3, Federal agencies, in turn, issued their own implementing procedures to supplement the 1978 Rule and integrate the NEPA process into the agencies' specific programs and processes. CEQ made technical amendments to the 1978 Rule in 1979⁴ and promulgated minor amendments to it in 1986,⁵ but left the regulations largely unchanged for over forty years. As a result, an extensive body of agency practice and caselaw developed based on the 1978 Rule.

On July 16, 2020, CEQ issued a final rule substantially revising the NEPA implementing regulations ("2020 Rule").⁶ As amended, 40 CFR 1507.3(b) requires Federal agencies to propose their own regulations to implement the 2020 Rule by September 14, 2021. CEQ issued a Memorandum to the Federal agencies on July 16, 2020, and the Office of Management and Budget (OMB) issued a Memorandum to the Federal agencies on November 2, 2020, establishing deadlines for Federal agencies to implement the September 14, 2021 deadline.⁷

On January 20, 2021, President Biden signed E.O. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, to empower America's workers, combat climate change, address environmental justice, and improve and protect public health and the environment.⁸ In accomplishing these goals, E.O. 13990 directs Federal agencies to ensure the integrity of their decision-making processes and make sound decisions based on science. E.O. 13990 directs Federal agencies to review Federal agency actions taken between January 20, 2017, and January 20, 2021, including the promulgation of regulations, for consistency with those priorities and to take appropriate action, including publishing for notice and comment a proposed rule suspending, revising, or rescinding actions found to be inconsistent

⁴ 44 FR 873 (Jan. 3, 1979).

⁵ 51 FR 15618 (Apr. 25, 1986) (amending 40 CFR 1502.22).

⁶ 85 FR 43304 (July 16, 2020).

⁷ CEQ, Memorandum for Heads of Federal Departments and Agencies, *Implementation of Updated National Environmental Policy Act Regulations* (July 16, 2020), <https://ceq.doe.gov/docs/laws-regulations/memo-implementation-updated-regs-2020-07-16-withdrawn.pdf>; *Budget and Management Guidance on Updates to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, M-21-01 (Nov. 2, 2020), <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-01.pdf>.

⁸ 86 FR 7037 (Jan. 25, 2021).

with them. An accompanying White House Fact Sheet specifically identifies the 2020 Rule as among the actions to be reviewed.⁹ On January 27, 2021, the President signed E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, which establishes a government-wide approach to reducing climate pollution and establishes an Administration policy to increase climate resilience, transition to a clean-energy economy and support economic opportunities in energy communities, address environmental justice issues and invest in disadvantaged communities, and spur well-paying union jobs and economic growth.¹⁰ E.O. 14008 also requires the Chair of CEQ and the Director of OMB to ensure that Federal infrastructure investments reduce climate pollution and that Federal permitting decisions consider the effects of greenhouse gas emissions and climate change.¹¹

CEQ is engaged in an ongoing and comprehensive review of the 2020 Rule for consistency with the nation's environmental, equity, and economic priorities; to evaluate the process CEQ used in developing the 2020 Rule; and to consider whether the 2020 Rule properly and lawfully interprets and implements NEPA. In conducting its review, CEQ will assess how to amend its NEPA regulations to deliver an efficient environmental review process that ensures robust public participation and environmental protection.

II. Summary of Final Rule

CEQ has begun its review of the 2020 Rule and has substantial concerns about the legality of the 2020 Rule, the process that produced it, and whether the 2020 Rule meets the nation's needs and priorities, including the priorities set forth in E.O. 13990 and E.O. 14008. These concerns include that some of the changes made to the NEPA regulations create confusion with respect to NEPA implementation, break from longstanding caselaw interpreting NEPA's statutory requirements, and may have the purpose or effect of improperly limiting relevant

⁹ White House Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

¹⁰ 86 FR 7619, 7622 (Feb. 1, 2021).

¹¹ *Id.* § 213(a).

NEPA analysis, with negative repercussions in critical areas such as climate change and environmental justice that are inconsistent with the mandates of E.O. 13990 and E.O. 14008. CEQ plans to address these issues through further rulemaking, as described below.

Notwithstanding CEQ's ongoing review, the severity of CEQ's concerns, and the likelihood that CEQ will propose significant amendments to the 2020 Rule, 40 CFR 1507.3(b) currently requires Federal agencies to propose revisions to agency-specific NEPA regulations within 12 months of September 14, 2020—by September 14, 2021. Through this interim final rule, CEQ revises § 1507.3(b) to change 12 months to 36 months, providing Federal agencies an additional two years, until September 14, 2023, to propose revisions to their NEPA procedures. Federal agencies have raised concerns to CEQ about developing revised procedures consistent with the 2020 Rule given its inconsistency with E.O. 13990 and E.O. 14008 and CEQ's ongoing review, which could result in additional changes to CEQ's NEPA regulations that would need to be reflected in agency procedures. This additional period of time will address these concerns and allow Federal agencies to avoid wasting resources developing procedures based upon regulations that CEQ may repeal or substantially amend.

Following this rulemaking, CEQ will initiate further rulemaking to propose amendments to the 2020 Rule to revise the NEPA implementing regulations to comply with the statute's text and goals; provide regulatory certainty to stakeholders; promote better decision making consistent with NEPA's statutory requirements; ensure appropriate coordination among Federal agencies, and State, Tribal, and local governments during the environmental review process; and meet environmental, climate change, and environmental justice objectives.

Extending the deadline in § 1507.3(b) without first seeking comment is appropriate for two reasons. First, this amendment is a rule “of agency organization, procedure, or practice” exempted from the Administrative Procedure Act's (APA's) notice and comment rulemaking procedures and the requirement that substantive rules be published in the Federal Register thirty days before the effective date. *See* 5 U.S.C. 553(b)(A), (d). Such procedural rules “are ‘primarily

directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties.”” *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (quoting *Batterton v. Marshall*, 648 F.2d 694, 702 n. 34 (D.C.Cir.1980)). In addressing rules of agency organization, procedure, or practice, “Congress intended . . . to distinguish between rules affecting different subject matters—the rights or interests of regulated parties, and agencies’ internal operations.” *Air Transp. Ass’n of Am. v. Dep’t of Transp.*, 900 F.2d 369, 378 (D.C. Cir. 1990), *vacated*, 498 U.S. 1077, 111 S. Ct. 944, 112 L. Ed. 2d 1033 (1991), and *vacated*, 933 F.2d 1043 (D.C. Cir. 1991) (internal quotations and citations omitted). Providing Federal agencies with additional time to prepare and propose their own NEPA implementing regulations does not “encode[] a substantive value judgment,” *Public Citizen v. Dep’t of State*, 276 F.3d 634, 641 (D.C. Cir. 2002) (quoting *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 327–28 (D.C. Cir. 1994), but rather merely avoids the wasted resources that could occur by requiring Federal agencies to propose revisions to their regulations before CEQ has completed its review. *See also, e.g., Elec. Priv. Info. Center v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5–6 (D.C. Cir. 2011); *Aulenback, Inc. v Fed. Highway Admin.*, 103 F.3d 156, 169 (D.C. Cir. 1997).

The purely procedural character of extending the time provided by § 1507.3(b) is reinforced by the fact that this provision only sets forth the deadline for Federal agencies to propose procedural revisions, rather than to finalize those revisions, and therefore has no substantive effect. Because § 1507.3(b) merely establishes an internal government deadline for Federal agencies to propose revisions to that agency’s internal NEPA procedures, CEQ has determined that amending that deadline fits within the category of procedural rules exempted from notice-and-comment rulemaking. CEQ nonetheless invites comments on this determination.

Second, even if extending the deadline in 40 CFR 1507.3(b) is not an exempted procedural rule, CEQ has good cause to issue an interim final rule. The APA authorizes agencies to issue regulations without notice and public comment when an agency finds, for good cause,

that notice and comment is “impracticable, unnecessary, or contrary to the public interest,” 5 U.S.C. 553(b)(B), and to make the rule effective immediately for good cause. 5 U.S.C. 553(d)(3). As discussed, 40 CFR 1507.3(b) requires agencies to submit proposals to implement the 2020 Rule within 12 months of September 14, 2020, and section 1507.3(b)(1) requires Federal agencies to consult with CEQ while developing proposals. To meet that deadline, agencies must therefore budget and devote funds and other resources for the revision of procedures in an expedited manner. CEQ also would have to expend its limited resources reviewing Federal agencies’ proposed implementing procedures before CEQ completes its review of the 2020 Rule and adopts any amendments. Prior to President Biden issuing E.O. 13990 and E.O. 14008, which initiated CEQ’s comprehensive review of the 2020 Rule, only the U.S. Department of Transportation (DOT) had published proposed procedures in the *Federal Register* for public comment after consulting with CEQ as required by 40 CFR 1507.3(b)(1). CEQ estimates that at least 85 more agencies must comply with the deadline established by 40 CFR 1507.3(b).

It is impracticable to amend the deadline in 40 CFR 1507.3(b) through an ordinary notice and comment process because there is not enough time to conduct an adequate public comment process and complete the rulemaking before the September 14, 2021, deadline and, even if CEQ could finalize amendment of this provision before September 14, 2021, Federal agencies would already have devoted significant resources to preparing their revised procedures. Given the extensive changes made to the NEPA regulations in the 2020 Rule, the proposed revisions to agency NEPA procedures called for in 40 CFR 1507.3 may be substantial and require significant lead time for agencies to complete before September 14, 2021, underscoring the impracticability of proceeding through ordinary notice and comment. The development of agency NEPA procedures typically involves significant coordination internal to the agency, especially when large Departments have multiple agencies within them. Additionally, the consultation process with CEQ involves discussions both during the agencies’ development of their procedures as

well as a formal review process where CEQ provides comments and agencies make additional revisions to their proposals before the agency issues them for public comment. As described above, only DOT published proposed procedures to satisfy the directive of 40 CFR 1507.3 between the time that the 2020 Rule was promulgated on July 16, 2020 and January 20, 2021, when E.O. 13990 directed CEQ to commence a review of the 2020 Rule, which evidences the significant investment of time and resources required for agencies to develop proposed implementing procedures. For this same reason, keeping the September 14, 2021, deadline without immediate action is contrary to the public interest because it would result in Federal agencies' wasteful expenditure of their resources and personnel to develop proposed procedures to implement a rule that CEQ is reviewing and intends to revise.

Finally, CEQ finds that it is unnecessary to accept comment before taking this action because extending the deadline for Federal agencies to propose implementing procedures will have no impact on the public. *See, e.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012). Additionally, CEQ accepted public comment on this 12-month deadline before promulgating the 2020 Rule, and the extension of the deadline involves similar issues (the need for time for agencies to update their procedures following changes to CEQ regulations). *See, e.g., Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 276 (D.C. Cir. 2014), vacated and remanded sub nom. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). Furthermore, OMB, the agency with oversight responsibility on regulatory processes, also has reached the conclusion that requiring agencies to report on their progress towards the September 14, 2021 deadline would be inconsistent with the Administration's policies.¹²

CEQ invites comment on this rule's amendment of § 1507.3(b) to extend by 2 years the period of time Federal agencies have to propose implementing procedures that conform with the

¹² *See Revocation of OMB Memorandum M-21-01, "Budget and Management Guidance on Updates to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act"*, M-21-23 (Apr. 26, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/04/M-21-23.pdf>.

2020 Rule, and CEQ's bases for issuing this amendment as an interim final rule. CEQ will consider comments it receives and take further action, if appropriate.

III. Rulemaking Analyses and Notices

A. Regulatory Procedures

Under the APA, an agency may waive notice and comment procedures if an action is an interpretative rule, a general statement of policy, or a rule of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A). As discussed in section II, CEQ has determined that this rule is a rule of "agency organization, procedure, or practice" and, therefore, CEQ is not required to engage in a notice and comment rulemaking process. Furthermore, because the rule is a procedural rule, rather than a substantive rule, it may be made effective immediately upon publication. *See* 5 U.S.C. 553(d).

B. E.O. 12866, Regulatory Planning and Review, and E.O. 13563, Improving Regulation and Regulatory Review

E.O. 12866 provides that OIRA will review all significant rules. E.O. 13563 reaffirms the principles of E.O. 12866, calling for improvements in the Federal Government's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory objectives. OMB determined that this final rule does not meet the requirements for a significant regulatory action under E.O. 12866, as supplemented by E.O. 13563, and therefore it was not subject to review.

C. Regulatory Flexibility Act and E.O. 13272, Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act, as amended, (RFA), 5 U.S.C. 601 *et seq.*, and E.O. 13272¹³ require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare an Initial Regulatory Flexibility

¹³ 67 FR 53461 (Aug. 16, 2002).

Analysis (IRFA) unless it determines and certifies that a proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). This interim rule does not directly regulate small entities. Rather, the rule applies to Federal agencies and sets forth the process for their compliance with NEPA. Accordingly, CEQ hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities.

D. National Environmental Policy Act

Under the CEQ regulations, major Federal actions may include regulations. When CEQ issued regulations in 1978, it prepared a “special environmental assessment” for illustrative purposes pursuant to E.O. 11991. 43 FR 25230, 25232 (June 9, 1978). The NPRM for the 1978 Rule stated “the impacts of procedural regulations of this kind are not susceptible to detailed analysis beyond that set out in the assessment.” *Id.* Similarly, in 1986, although CEQ stated in the final rule that there were “substantial legal questions as to whether entities within the Executive Office of the President are required to prepare environmental assessments,” it also prepared a special environmental assessment. 51 FR 15618, 15619 (Apr. 25, 1986). The special environmental assessment issued in 1986 made a finding of no significant environmental impact, and there was no finding made for the assessment of the 1978 Rule. CEQ has similarly developed a special environmental assessment for this rule and made a finding of no significant impact, and included them in the docket for this rulemaking.

E. E.O. 13132, Federalism

E.O. 13132 requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.¹⁴ Policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the

¹⁴ 64 FR 43255 (Aug. 10, 1999).

various levels of government. CEQ does not anticipate that this interim final rule has federalism implications because it applies to Federal agencies, not States.

F. E.O. 13175, Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires agencies to have a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.¹⁵ Such policies include regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Presidential Memorandum of January 26, 2021 on Tribal Consultation and Strengthening Nation-to-Nation Relationships reaffirms the provisions of E.O. 13175 and directs Federal agencies to develop an action plan to implement E.O. 13175. CEQ adopted an Action Plan for Consultation and Coordination with Tribal Nations on April 26, 2021, to direct CEQ's actions to identify policies with Tribal implications and ensure sustained and meaningful consultation. This interim final rule is not a regulatory policy that has Tribal implications because it merely extends the time by which Federal agencies have to propose updates to their NEPA implementing procedures.

G. E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

E.O. 12898 requires agencies to make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of agency programs, policies, and activities, including rulemakings, on minority populations and low-income populations.¹⁶ This interim final rule would extend the deadline by which agencies have to submit proposals for changes to their NEPA procedures. Submitting a proposal for changes to the NEPA procedures does not change the manner in which Federal agencies implement NEPA; agencies would still need to subject

¹⁵ 65 FR 67249 (Nov. 9, 2000).

¹⁶ 59 FR 7629 (Feb. 16, 1994).

those procedures to notice and comment and then issue final procedures. Therefore, submitting a proposal does not have adverse human health or environmental effects. CEQ has determined, therefore, that this interim final rule would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations.

H. E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use

Agencies must prepare a Statement of Energy Effects for significant energy actions under E.O. 13211.¹⁷ This interim final rule is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. E.O. 12988, Civil Justice Reform

Under section 3(a) of E.O. 12988,¹⁸ agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct. Section 3(b) provides a list of specific issues that agencies should consider when conducting the reviews required by section 3(a). CEQ has conducted this review and determined that this interim final rule complies with the requirements of E.O. 12988.

J. Unfunded Mandate Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) requires Federal agencies to assess the effects of their regulatory actions on State, Tribal, and local governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a State, Tribal, or local government, in the aggregate, or by the private sector of \$100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on State, Tribal, and local governments and the private sector. 2 U.S.C. 1532. This interim final rule applies to Federal agencies and would not result in expenditures of

¹⁷ 66 FR 28355 (May 22, 2001).

¹⁸ 61 FR 4729 (Feb. 7, 1996).

\$100 million or more for State, Tribal, and local governments, in the aggregate, or the private sector in any 1 year. This action also does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531–1538.

K. Paperwork Reduction Act

This interim final rule does not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 1507

Administrative practice and procedure; Environmental impact statements; Environmental protection; Natural resources

Dated: June 22, 2021.

Brenda Mallory,
Chair.

For the reasons stated in the preamble, the Council on Environmental Quality amends part 1507 in title 40 of the Code of Federal Regulations to read as follows:

PART 1507—AGENCY COMPLIANCE

1. The authority citation for part 1507 continues to read as follows:

AUTHORITY: 42 U.S.C. 4321-4347; 42 U.S.C. 4371-4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, 3 CFR, 1966-1970, Comp., p. 902, as amended by E.O. 11991, 42 FR 26967, 3 CFR, 1977 Comp., p. 123; and E.O. 13807, 82 FR 40463, 3 CFR, 2017, Comp., p. 369.

2. Amend § 1507.3 by revising the first sentence of paragraph (b) introductory text to read as follows:

§ 1507.3 Agency NEPA procedures.

* * * * *

(b) No more than 36 months after September 14, 2020, or 9 months after the establishment of an agency, whichever comes later, each agency shall develop or revise, as necessary, proposed procedures to implement the regulations in this subchapter, including to eliminate any inconsistencies with the regulations in this subchapter. * * *

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[FR Doc. 2021-13770 Filed: 6/28/2021 8:45 am; Publication Date: 6/29/2021]